

# **Exhibit 16**

# Akin Gump

STRAUSS HAUER & FELD LLP

CHRISTOPHER KEOUGH  
202.887.4038/fax: 202.887.4288  
ckeough@akingump.com

May 2, 2019

Via FedEx Tracking 7751 1717 5809  
and Email (FOIA.Public.Liaison@ssa.gov)

Executive Director,  
Office of Privacy and Disclosure  
Social Security Administration  
G-401 WHR  
6401 Security Boulevard, Baltimore 21235

Re: Freedom of Information Appeal  
Ref. No. SSA-2017-001087

Dear Sir or Madam:

We write to appeal the Social Security Administration's (SSA) determination to withhold materials responsive to the above-captioned Freedom of Information Act (FOIA) request. As discussed more fully below, SSA's determination is contrary to law for two fundamental reasons. First, the agency failed to produce any of the requested SSID computation and payment history data for the particular periods specified in the FOIA request. Second, the agency unlawfully refused to produce any information for 116 out of 117 individuals for whom the agency requested, and the hospitals provided, additional proof of death through extracts from the Medicare Common Working File reflecting official reports or finding of death by the Department of Health & Human Services. Accordingly, we request that SSA immediately provide the information requested **for the periods specified** in the above-referenced FOIA request for all but one of the 433 individuals identified in the March 2017 FOIA request.

## BACKGROUND

1. By letter dated March 6, 2017, counsel acting on behalf of over 60 hospitals filed a FOIA request with the SSA Office of Privacy and Disclosure. The request sought copies of all "Supplemental Security Income Displays" (SSID) for deceased Medicare beneficiaries who had received treatment at the hospitals. The FOIA request included attached listings identifying 433 deceased individuals and the dates of each individual's hospital stay. The hospitals emphasized that they were requesting "the computation and payment history field," for each beneficiary, "for the periods referenced [in the patient lists]." Exhibit 1.

2. By letter dated July 14, 2017, SSA denied the hospitals' FOIA request, stating that the requested SSID records were exempted from disclosure. Exhibit 2.

3. The hospitals timely appealed that denial by letter dated August 18, 2017. Exhibit 3. In their appeal, the hospitals noted that their FOIA request is virtually identical to a 2003 request submitted through the same undersigned counsel on behalf of another hospital seeking the exact same SSID records with respect to other Medicare beneficiaries. The hospitals also explained that the 2003 request (*see* Attachment 1 to Exhibit 3), like the hospitals' request here, was made for the purpose of confirming the accuracy of the Medicare payment calculations by CMS that make use of SSI eligibility data for periods of hospitalization. Attached at Exhibit 4 is a redacted version of one of the SSIDs produced by SSA in response to that 2003 request.

4. By letter dated December 4, 2017, SSA reversed its decision and determined that the agency "can release portions of the requested SSIDs under the FOIA subject to proper proof of death and receipt of payment." Exhibit 5. At the same time, the agency asked for clarification that the information requested now is the same as the information that SSA had previously provided in response to the 2003 FOIA request. *Id.*

5. Counsel for the hospitals promptly confirmed in a letter dated December 7, 2017 that they are seeking the same information in response to this FOIA request. *See* Exhibit 6 (response confirming that the hospitals are "requesting SSIDs in the same format" that SSA previously produced).

6. In early 2018, SSA again asked the hospitals to confirm their interest in the long-pending FOIA request by providing payment information to the agency and electronic copies of the patient listings that accompanied the March 6, 2017 FOIA request, which the hospitals promptly did. Exhibits 7 and 8 (SSA request and hospital response).

7. By letter dated April 11, 2018, SSA asked the hospitals to provide proof of death for 117 of the 433 deceased Medicare beneficiaries listed in the March 2017 FOIA request. Exhibit 9. The agency claimed that, under federal law, it cannot disclose information concerning the date of death of an individual for whom a state-provided record was the sole source of death in the agency's records. SSA indicated that it would accept as proof of death "a copy of an official report of death or finding of death made by an agency or department of the U.S. which is authorized or required to make such a report of finding in the administration of any law of the U.S." *See* 20 C.F.R. 404.720(b)(3) (SSA regulation stating that an "extract from an official report or finding of death made by an agency or department of the United States" is "preferred evidence of death.").

8. By email dated May 4, 2018, hospital counsel sent the agency proof of death for 116 of the 117 requested individuals. Exhibit 10. This proof was in the form of screen prints extracted from the Medicare Common Working File reporting the date of death for each of the 116 beneficiaries. *Id.*



9. The Medicare Common Working File is derived from the Medicare Beneficiary Database, which the Department of Health and Human Services shares with SSA. *See, e.g.*, 69 Fed. Reg. 18,664 (Apr. 8, 2004) (establishing data exchange between SSA and CMS); *see also, e.g.*, CMS Program Transmittal No. 1375 (May 1, 2014) (clarifying connection between Medicare Beneficiary Database and Medicare Common Working File).

10. By email dated July 12, 2018, SSA FOIA staff asserted that the Common Working File screens “are foreign to SSA in that we are not familiar with them,” and asked the hospitals to provide a further “certification from HHS” to validate the Common Working File screens. Exhibit 11. Such further certification is not required by SSA regulations, 20 C.F.R. 404.720(b)(3).

11. The parties held a conference call on August 14, 2018 which SSA summarized by email dated September 10, 2018. Exhibit 12. SSA stated that it “understand[s] that the [Common Working File] is accessed by certain SSA and CMS staff in the administration of the Medicare program (under an agreement between both agencies).” The SSA FOIA staff reiterated its purported need for proofs of death for the 116 individuals because the FOIA staff themselves allegedly do not have access to the Common Working File. SSA FOIA staff agreed at that time to provide SSID records for those individuals for which it did not require further proof of death.

12. By email dated February 20, 2019, SSA staff again requested clarification of the scope of the hospitals’ FOIA request. Exhibit 13. The agency also asked whether the hospitals “require the full SSID or just the most recent SSID for each number holder[.]” *Id.*

13. On February 22, 2019 hospital counsel replied to that additional request for clarification, reiterating again that the hospitals requested “hard copies of the Supplemental Security Income Displays (SSIDs), current and stale (active or inactive) including the computation history field and payment history field **for the periods noted in the patient listings that accompanied our request.**” Exhibit 14 (emphasis added). The hospitals also advised that they were prepared to file suit on April 1, 2019 if the agency did not produce the requested documents.

14. By letter dated April 3, 2019, which was delivered to undersigned counsel on April 8, 2019, SSA produced incomplete SSID information for 316 of the 433 requested deceased beneficiaries. Exhibit 15. The agency indicated that it made redactions pursuant for FOIA Exemption 6 to protect individual privacy rights, and refused to provide any records for the 117 of deceased beneficiaries for which the agency allegedly needed certification of the proofs of death that the hospitals provided.

15. The records that SSA provided are not responsive to the hospitals’ long-pending and often repeated request and are of no use to them. Rather than produce the full computation and payment histories for the periods specified in the listings attached to the FOIA request, as requested and repeatedly reiterated in response to repeated requests for clarification, the agency produced only the latest entry in each of these fields, generally the data for the month (after the periods of hospitalization that were expressly requested) when benefits were terminated. The



SSID information produced by SSA does not include the eligibility and payment data in the computational and payment histories for the hospitalization periods that were specified in the FOIA request and reiterated repeatedly in response to the agency's repeated clarification requests. *See, e.g.*, Exhibits 5, 7, 13.

### ARGUMENT

#### I. The Records Produced for 316 Individuals Do Not Include the Computational and Payment Histories Requested For the Periods Specified in the FOIA Request

The FOIA requires federal agencies to release records to the public upon request, unless a statutory exemption to disclosure applies. 5 U.S.C. §§ 552(a),(b). The FOIA also requires agencies to make "reasonable efforts" to search for requested records maintained in electronic format. 5 U.S.C. § 552(a)(3)(C). In this instance, the SSA FOIA office has utterly failed to produce any of the information the hospitals requested, not even for the 316 individuals who are the subject of the records produced by SSA.

As discussed above, the hospitals specifically requested the computational history and payment history for periods of hospitalization specified for each individual in the listings that were attached to the FOIA request. The agency produced none of that information for any individual. In every case, the agency limited the computational and payment history data to the latest entry in each field, generally for the month when benefits were terminated, long after the periods of interest that were specified in the FOIA request. For example, for the patient listed as entry number 41 on the patient listings that accompanied the original FOIA request, the hospitals requested the computational history and payment history for hospital service dates in June 2005. Exhibit 1. In response, SSA produced an incomplete SSID record established in April 2000, which reflects computational and payment history entries from October and November 2010, when benefits were terminated and long after the June 2005 period specified in the FOIA request. Exhibit 15. This same pattern is repeated throughout the entire FOIA response. None of SSID records produced by SSA contains any computational and payment history data for the period specified in the FOIA request in stark contrast with the agency's prior response to the same FOIA request submitted by the undersigned counsel in 2003, *see* Exhibits 3 and 4, despite the facts that both requests used identical language (*see* Exhibit 3, SSID sample shows computation history ranging from January 1990 through May 1994) and undersigned counsel expressly confirmed to SSA that the hospitals want the same information in the same format, in response to this request. *See* Exhibits 6, 13.

#### II. The Agency Wrongly Refused To Produce Any Information For the 116 Deceased Individuals

SSA FOIA staff also erred in refusing to produce any information for 116 deceased individuals included in the FOIA request. The hospitals provided adequate proof of death for 116 of the 117 individuals identified by SSA FOIA staff in its request for additional proof of death. The screen prints provided to SSA are "extract[s]" from the Medicare Common Working File, a database maintained by CMS in its administration of the Medicare program, and the dates



Executive Director  
May 2, 2019

**Akin Gump**  
STRAUSS HAUER & FELD LLP

of death reported in the Common Working File are an “official report or finding of death,” that is made by CMS, a division of the United States Department of Health & Human Services. *See* 20 C.F.R. 404.720(b)(3). *See also* SSA Program Operations Manual System, GN 02602.050 (stating that reports from CMS constitute acceptable “Third-party reports of death.”) (available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0202602050> (last visited May 2, 2019)).

Moreover, if SSA feels some need (above and beyond the regulatory requirements) to confirm the proofs of death that the hospitals provided, the agency has the means to do so at its disposal. As noted above, the Department of Health and Human Services shares the Medicare Beneficiary Database, from which the Common Working File is derived, with the with SSA through an established computer matching program. *See, e.g.*, 69 Fed. Reg. at 18,664, CMS Program Transmittal No. 1375 (May 1, 2014). There is no dispute that SSA has access to the dates of death reported in the Medicare Common Working File. *See* Exhibit 12. And it is irrelevant whether SSA FOIA staff themselves have access and it is “foreign” to them. *See id.* Regardless of whether SSA FOIA staff are themselves familiar with the Medicare Common Working File, SSA has access to the source of the reports of death that the hospitals extracted from an official CMS report or finding of death and the governing regulation in 20 C.F.R. 404.720(b)(3) imposes no requirement that a party obtain a further “certification” from a government agency in addition to an “extract from an official report or finding of death” made by that agency.

### CONCLUSION

For the reasons stated above, SSA’s determination to withhold materials responsive to the hospitals’ FOIA request must be reversed. We respectfully request that SSA immediately produce the SSID data requested for the periods specified in the March 2017 FOIA request for 432 of the 433 deceased individuals listed in that request.

Sincerely,



Christopher L. Keough

**EXHIBITS**

- Exhibit 1      FOIA Request, March 6, 2017  
(redacted and numbered sequentially)
- Exhibit 2      FOIA Request Denial, July 14, 2017
- Exhibit 3      FOIA Appeal, August 18, 2017  
(including attached 2003 FOIA request, other attachments omitted)
- Exhibit 4      Excerpt from Response to 2003 FOIA Request (redacted)
- Exhibit 5      SSA FOIA Appeal Determination, December 4, 2017
- Exhibit 6      Hospital Response to SSA Appeal Determination, December 7, 2017
- Exhibit 7      SSA Fee Notice and Request for Electronic Patient Logs, February 8, 2018  
(attachments omitted)
- Exhibit 8      Response to Fee Notice and Request for Electronic Patient Logs,  
February 14, 2018 (attachments omitted)
- Exhibit 9      SSA Request for Proofs of Death, April 11, 2018
- Exhibit 10     Email Submitting Proofs of Death, May 4, 2018  
(including a redacted copy of one of the 116 attached screen prints from  
the Medicare Common Working File)
- Exhibit 11     SSA Request for Certification of Proofs of Death, July 12, 2018
- Exhibit 12     SSA Summary of Conference Call, September 10, 2018
- Exhibit 13     SSA Clarification Request, February 20, 2019
- Exhibit 14     Hospital Response to Clarification Request, February 22, 2019
- Exhibit 15     FOIA Response Letter, April 3, 2019  
(including redacted version of one SSID record produced by SSA)